IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 909

ANTHONY GIARDANO and
ANTHONY LOPIPARO,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioners pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Eighth Circuit, entered in this case on January 8, 1958.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra, p. 21) is not yet reported.

JURISDICTION.

The judgments of the Court of Appeals were entered on January 8, 1958 (Appendix, infra, pp. 38, 39). A timely petition for rehearing was filed, and this petition was overruled on February 10, 1958. An order of March 1, 1958, by Mr. Justice Whittaker extended the time for filing petition for certiorari to April 10, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

(1) Whether, in a prosecution for conspiracy to attempt to evade corporate income taxes, the trial court should have instructed the jury on the substantive offense alleged to be the object of the conspiracy.

(2) Whether, in a conspiracy case after the trial court instructs the jury that they must find petitioners guilty if they found any one of eight overt acts were committed, the trial court should have instructed the jury that it was necessary to reach a unanimous verdict as to any overt act or acts found to have been committed and should have further required the jury to return special verdicts as to each overt act.

(3) Whether a conspiracy verdict should be set aside when it is not possible to identify the overt act or acts found when some of the separate acts submitted were insufficient.

(4) Whether, under a charge of conspiracy to commit a substantive offense, the trial court by instructing the jury on the charge of conspiring to defraud the United States placed the defendants on trial for a charge not contained in the indictment.

(5) Whether the dismissal of the substantive count at the close of the government's case constituted an acquittal

of the conspiracy count, under the doctrines of former jeopardy and res judicata, where the substantive and conspiracy offenses were identical.

(6) Whether, under a charge of conspiracy to evade corporate income tax in which one of the means and overt acts alleged is that defendants used pressure and fear to obtain customers for the corporation, the trial court should have sustained their motions to strike these allegations from the indictment and should have sustained their objections to the reading of these allegations to the jury.

(7) Whether, under a conspiracy indictment alleged to have terminated on May 27, 1953, the trial court erred in admitting evidence of counterfeiting on September 11, 1953, and in instructing the jury that this evidence might be considered on the issue of petitioner's intent.

(8) Whether the trial court erred in admitting into evidence the corporation tax return against petitioner Giardano and erred in failing to instruct the jury that under Section 145 (d) of the Internal Revenue Code of 1939 said petitioner was under no duty to file that return.

(9) Whether the trial court erred in its limited instruction regarding the meaning of the word "wilfully".

(10) Whether the crime charged, conspiracy to attempt to evade a tax, is an offense against the laws of the United States.

(11) Whether the trial court erred in admitting into evidence summaries of the books and records against petitioner Giardano, a vice-president and minority stockholder of the corporation.

(12) Whether the evidence was sufficient to justify the verdict.

STATUTES AND RULE INVOLVED.

18 U. S. C. 371 provides as follows:

> Conspiracy to commit offense or to defraud United States.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * * * *

Internal Revenue Code of 1939:

Sec. 145. Penalties.

(a) . . .

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) . . .

(d) Person defined. The term 'person' as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty

to perform the act in respect of which the violation occurs.

* * * * * * *

Federal Rules of Criminal Procedure:

Rule 7. The Indictment and the Information.

* * * * * * *

(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

STATEMENT.

Petitioners, the Twin City Distributing Company, a corporation, and Ralph Caleca, were charged in a two count indictment alleging in count one the substantive offense of wilfully attempting to evade a part of the income taxes due from the corporation for the fiscal year ending March 31, 1953, by filing a false corporation tax return, and in count two a conspiracy to wilfully attempt to evade the same taxes by certain means set forth in detail and committing eight overt acts to effect the object of the conspiracy. The conspiracy was charged to have commenced on January 1, 1952 and ended on May 27, 1953, the day of the filing of the return (R. 1-6). The amounts of income and the tax due thereon as reported in the return and as corrected were alleged to be as follows (R. 1-2):

Reported		Corrected	
Income	Tax	Income	Tax
$8,344.85	$2,503.46	$36,225.85	$15,149.48

The first count was dismissed by the government at the close of the case (R. 156) and after a jury trial petitioners were found guilty as charged on the second count (R. 174), and on October 29, 1956, they were fined $5,000.00 and sentenced to imprisonment for four years (R. 178-179).

Eight overt acts charged to effect the object of the conspiracy were in substance (R. 4-6): (1) that petitioners compelled various cigarette vendors, by the use of the medium of fear, to have cigarettes sold by them stamped with the City of St. Louis tax stamp by the Twin City Distributing Company; (2) defendants used a counterfeit cigarette tax stamp impression fo such stamping; (3) defendants received payments in cash in the amount of $27,881.00 more or less for affixing the tax stamp impression on cigarette packages and failed to record the amounts so received on the corporation books; (4) petitioners demanded that payments for the service of stamping cigarette packages be made partially by check, for the smaller portion of the charges to the bookkeeper of the corporation and partially by cash for the greater portion of the stamping charges incurred, such cash payments to be made to either or both petitioners; (5) defendants caused receipts to be issued to customers for payments made by check to the corporation for the stamping and caused no receipt to be issued for cash payments therefor; (6) petitioners instructed a customer not to keep any record of the cash payments made to petitioners for tax stamping by said customer; (7) defendants caused check payments to be placed in the corporation's depository and cash payments to be withheld from said depository; (8) Anthony Lopiparo and Ralph Caleca as President and Secretary-Treasurer of said corporation filed and caused to be filed a corporation income tax return with the Director of Internal Revenue.

The evidence offered by the government may be summarized as follows:

Petitioners were officers of the defendant corporation which was engaged in the business of selling cigarettes through vending machines and to others who sold through such machines in the St. Louis area (R. 52-53). They employed a bookkeeper to keep the books for the business

(R. 55) and an accountant to audit the books and make out the corporation federal income tax return from the books he audited (R. 44). The corporation received income from vending machine sales, over the counter sales, and from cigarette tax stamping for six cigarette dealers who also sold cigarettes through vending machines (R. 45-47). The theory of the government was that the corporation return was false in not reporting all of its income from these dealers who had cigarettes stamped by the corporation (R. 134-136), for the purpose of complying with the cigarette tax imposed by the City of St. Louis at the rate of two cents per pack or ten dollars a case for 500 packages of cigarettes (R. 35). Payment of the City tax was required to be shown by the use of the stamp imprinted on each package of cigarettes so sold and dealers were allowed to do their own imprinting with a Pitney-Bowes machine (R. 35). It was the government's position that these dealers made payments to the corporation at lawful rates which were disclosed to the bookkeeper and as a result included in the corporate tax return and that other payments in cash at a cut-rate were omitted from the tax return (R. 59-60, 65-68, 76-79, 89-90, 93-97, 98-100, 103-107). Petitioner Lopiparo signed the return but petitioner Giardano did not sign it (R. 30).

The court below found that petitioners compelled the six cigarette dealers by the medium of fear of "at least of economic loss" from testimony of two of the dealers that they lost the right to place their vending machines in several locations to defendant corporation during the period when petitioners solicited their stamping business (R. 76, 105-106, 163). But the dealers testified that this was a normal business practice in a competitive business (R. 86, 103). Another dealer had also lost a location to Twin City prior to the solicitation (R. 69). The other dealers did not lose any locations to the Twin City Company (R. 61-62). All said it was normal procedure to obtain and lose locations (R. 69, 86, 103). The trial court

overruled petitioners' pre-trial motion to strike and trial objections to the compulsion and fear allegations in the indictment which objections were on the ground that the allegations were designed to place before the jury other acts of alleged misconduct not relevant and material (R. 6-8-9, 10-12, 150).

No dealer testified that petitioners nor anyone else ever instructed them not to keep a record of their cut-rate cash payments.

On September 11, 1953, over three months after the termination of the alleged conspiracy, City Police Officers made purchases of cigarettes from vending machines licensed to the defendant company (R. 109-117) and an examination of the packages and the tax stamps on them by an expert witness disclosed that a counterfeit die had been used in stamping them (R. 118-124). The serial number of the tax stamping machine possessed and used by the corporation and the tax impression on the bottom of the cigarette packs had the same number. This evidence, admitted over objection, was limited by the Court to the issue of petitioners' intent (R. 158).

In the charge to the jury, the trial judge read the conspiracy statute (R. 149) but failed to read the provisions of the substantive statute, 26 U. S. C., former 145 (b), which was the alleged objective of the conspiracy. Continuing the Court instructed (R. 160-162):

> "The overt act that is required to complete the offense is any act committed by one of the conspirators done consciously in furtherance of the conspiracy. The overt act need not be criminal in nature if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows and tends to accomplish the plan or agreement and must be done in furtherance of an object or purpose of the conspiracy.

"You will recall that under Count 2 of the indictment it is alleged that eight separate overt acts were committed by one or more of the defendants. They consist of such acts as receiving cash from customers of said corporation in payment for affixing the City of St. Louis Cigarette Tax Stamp impression on cigarette packages and failure to record such cash payments on the books and records of said corporation.

"It is not necessary for the prosecution to prove each one of the eight overt acts. The conspiracy offense is complete if any of these overt acts were committed as alleged in the indictment by one of the conspirators, and, in that event, it is complete as to any and every person found by you to be a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act. * * * All parties to the conspiracy are responsible and chargeable with the acts done by any one or more of the parties to the conspiracy, when done to effect the object of a conspiracy. So if in this case, you determine that either of the defendants was a party to the conspiracy charged, then such defendant, or defendants, as are shown to be parties to the conspiracy, are responsible for all acts committed by any party or parties to the conspiracy, and which acts are done to effect the objects of the conspiracy."

The court further charged (R. 162):

"So, I say to you, when you retire to your jury room and you take up and consider Count 2 of the indictment, first consider if a conspiracy as charged in the second count of the indictment has been committed by the defendants. Take each defendant one at a time, in turn, and decide as to that defendant. If you find that the defendants, or either of them, did enter into the conspiracy as charged, then proceed to determine if any or more of the parties to the conspiracy,

so found, committed any one or more of the overt acts charged in Count 2 of the indictment, to effect the object of the conspiracy."

The trial court did not submit special verdicts or findings nor did it require that the jury be unanimous on any overt act which it found. The court also instructed that they could convict on "some affirmative and positive acts of fraud in connection with the corporate income tax return of the Twin City Distributing Company" (R. 146).

REASONS FOR GRANTING THE WRIT.

1. There is a conflict between the opinion of the Court of Appeals for the Eighth Circuit and other circuits on the failure to give a definition of the essential elements of the offense. This Court, therefore, should grant a hearing to resolve the conflict. The court below recognizes this conflict in its opinion by stating in regard to the failure of the trial court to read the substantive offense, 26 U. S. C. A., former 145 (b), to the jury as follows:

> "On trial of conspiracy to steal a horse it might not be inappropriate to read the statute against stealing, but a fair trial might well be afforded without such reading. In this case there is no reason to infer that any prejudice could have been caused by defendant by not reading the words of the statute against willfully attempting to evade a federal tax. The content of the statute was clearly before the jury. It was not reversible error that the court did not read the section, absent any request of defendant to do so. United States v. Heine, 2 Cir., 149 F. 2d 485; United States v. Capitol Meats, 2 Cir., 166 F. 2d 537, certiorari denied 334 U. S. 812, 68 S. Ct. 1018, 92 L. Ed. 1743; Lewis v. United States, 10 Cir., 49 F. 2d 272. Though certain cases cited in the foregoing decisions would lead to a contrary conclusion, we are not in accord with them."

This decision is contrary to the holding of the Court of Appeals for the Ninth Circuit in **Morris v. United States,** 156 F. (2d) 525, 528-529, quoting in part from Holdsworth, History of English Law:

> "'Judges must explain the law to the jury. They must separate the rule of law from the question of fact. This produces both precision in the statement of the rule, and a clear outside judgment on the facts.' Thus, at an early stage in legal history, we find the judge duty bound in his position to give instructions on the law to the jury . . ."
>
> "The classical practice is that the judge delivers the applicable law of the case, defining and explaining the offense charged against the defendant, and the jury thus being informed as to the exact law, which they must determine has been or has not been violated by the defendant, places its determination of the facts alongside the law and reports in the open court in a single verdict of 'guilty' or 'not guilty.' Sparf v. United States, 1895, 156 U. S. 51, 715, 15 S. Ct. 273, 39 L. Ed. 343; 1 Randall, Instructions to Juries, §§ 1, 97, 118; Hughes, Criminal Law and Procedure, pp. 693, 696. . . ."

The Ninth Circuit further held that an instruction which does not state any proposition of law, or only states the result of the law's application is erroneous.[1]

In **United States v. Levy,** 153 F. (2d) 995, 998, 3 Cir., the Third Circuit also held:

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[1] See Screws v. U. S., 1945, 325 U. S. 91, 107, 89 L. Ed. 1495; Bird v. U. S., 180 U. S. 356, 361, 45 L. Ed. 570; Sparf v. U. S., 156 U. S. 51, 715, 39 L. Ed. 343; Corson v. U. S., 9 Cir., 1944, 147 F. (2d) 427; Christensen v. U. S., 7 Cir., 90 F. (2d) 152; U. S. v. Harris, 2 Cir., 45 F. (2d) 690; Kreiner v. U. S., 11 F. 722; Allen v. Roydhouse, D. C. Pa., 232 F. 1010; Massee v. Williams, 6 Cir., 207 Fed. 222; 3 Blackstone's Commentaries 375; 23 C. J. S., Criminal Law, Secs. 1189, 1190 (b); 53 Am. Jur., Sec. 509; Farley's Instructions to Juries, 42 Yale Law Journal 191; Reed, Branson's Instructions to Juries, Vol. 1, Sec. 2; Clark Criminal Procedure, Secs. 174-176.

"In his instructions to the jury the trial judge did not describe the offenses charged in the indictment. He did not even mention the pertinent provisions of the Emergency Price Control Act of 1942, as amended or of Maximum Price Regulations 193 and 445. . . .

* * * * * * *

"Both parties agree that in a criminal case it is a court's duty to charge a jury on all essential questions of law, whether requested or not. Miller v. United States, 10 Cir., 1941, 120 F. 2d 968, 972; Kinard v. United States, 1938, 68 App. D. C. 250, 96 F. 2d 522, 524."

This Court should therefore grant the writ in order to resolve the conflict in principle between the circuits and to decide an important question of criminal law, which has not been, but should be, decided by this Court.

2. Under the instructions the jury was allowed to find the defendants guilty if they found an unlawful agreement and the commission of only one overt act (R. 160-161). While it is settled that a conspiracy charge requires but one overt act and the prosecution need not prove each overt act charged, this rule has never been construed to allow the jury to find a defendant guilty without unanimity as to the overt act or acts found. Here, the court failed to instruct the jury that it must be unanimous in finding such overt act or acts that it found in furtherance of the conspiracy. Several of the jurors might have agreed on one overt and several on other overt acts and yet all 12 might not have agreed on a specific overt act and be unanimous on that overt act. The requirement of unanimity in a jury verdict extends to all issues. **Andres v. United States**, 333 U. S. 740, 748.

The trial court after giving this instruction that one overt act was sufficient should have also required the jury to return special verdicts or findings.

It has been stated in **Anderson v. United States**, 9 Cir., 273 F. 677, 679, that "it is not the practice of the Federal Courts in criminal cases to call for special verdicts." See also **Gray v. United States**, 8 Cir., 174 F. (2d) 919. But it has been suggested by this court in **Cramer v. United States**, 325 U. S. 1, 36, that special findings may be required:

> "The verdict in this case was a general one of guilty without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient. . . ."

Special findings were required in the instant case to determine both whether the jury was unanimous and whether the verdict rested on an overt act which was sufficient or insufficient.

Therefore, an important question is raised in this case whether under a conspiracy indictment charging several overt acts, it is necessary to submit special verdicts to the jury on each of the overt acts in order to determine which, if any, overt acts the jury is unanimous upon or whether it is necessary to instruct them that whatever overt act they do agree upon they must be unanimous as to that overt act. Especially is this requirement necessary when the trial judge instructs the jury that it is only necessary for them to find one of the overt acts submitted.

3. Eight overt acts were alleged in furtherance of the conspiracy to attempt to evade taxes. But not all of the acts charged could be regarded to be in furtherance of the conspiracy alleged. Yet, the acts relied upon as overt acts must properly be regarded as in furtherance of the conspiracy charged. **Grunewald v. United States**, 353 U. S. 400. The court allowed the jury to convict if they found any of the overt acts including the ones insufficient to sus-

tain a verdict. When alternate degrees of guilt are submitted, some correct and others incorrect, the judgment must be reversed because it is impossible to tell which the jury followed. **Cramer v. United States,** 325 U. S. 1, 35; **Stromberg v. California,** 283 U. S. 359, 368; **Williams v. North Carolina,** 317 U. S. 287, 292.

Overt act 8 was clearly insufficient. It charged that petitioners Lopiparo and Caleca on May 27, 1953, filed a corporation income tax return for the Twin City Distributing Company for the fiscal year ended March 31, 1953. A finding of the jury that this act was committed would be legally insufficient in itself to sustain a judgment of conviction. The function of the overt act in a conspiracy case is simply to manifest "that the conspiracy is at work" and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence. **Yates v. United States,** 350 U. S. 860, 77 S. Ct. 1064. The issue then presented is whether the mere filing of a corporation income tax return is such an act as to manifest "that the conspiracy is at work". Such an act does not show that the conspiracy "is at work." If two or more individuals have orally agreed to evade a federal income tax of a corporation by filing a false and fraudulent return and thereafter a tax return for the corporation is filed by the person or persons who are under a duty to file that return and the return is not false and fraudulent, that act would not show or manifest that the conspiracy is at work. It would only show that the persons under a legal duty to file a return did so. Otherwise, plotters who schemed to evade a tax could not abandon the plot before the filing of a return without committing an offense. The compliance with the legal duty to file a return should not change an abortive conspiracy into a completed offense. A person cannot be convicted for doing the very thing which it is a crime to fail to do. **Toyosaburo Korematsu v. United States,** 323 U. S. 214,

220. The mere filing of the return in the instant case would not be a sufficient finding by the jury that defendants conspired and agreed to evade the corporation income tax and committed an overt act in furtherance thereof.

Overt act 1 alleged that defendants compelled various cigarette vendors by the use of the medium of fear to have their cigarettes stamped by the Twin City Corporation (R. 4). Such an overt act can not be regarded to be in furtherance of a conspiracy to evade taxes. There is no relationship between compelling customers to use a service *and a conspiracy* to evade taxes. It also was not supported by the evidence. Petitioners never physically removed vending machines nor were they responsible for so doing. The evidence only disclosed that these vendors lost some vending machine locations by ordinary business competition mainly to other dealers not connected with Twin City (R. 69, 105-106, 103, 86).[2]

The reliance of the court below on **Gilson v. U. S.**, 2 Cir., 258 F. 588, 590, was misplaced. The holding in that case is that if there are both proved and unproved overt acts a charge to the jury is correct which requires them to find only a single overt act. This case is not in accord with **Cramer v. United States**, 325 U. S. 1, 36.

4. Where important questions of criminal law are presented by this petition which have not been fully passed upon, this Court should in its supervisory capacity over criminal procedure grant certiorari.

Section 371 of Title 18 sets forth two separate conspiracy crimes: (1) conspiracy to commit any offense against the United States and (2) conspiracy to defraud the United States.

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2 Petitioners also believed that the evidence was insufficent to prove each overt act. There was no evidence to support the allegation of overt act 6 that petitioners appeared before a customer and directed the customer not to keep any record of payments made to the corporation.

The indictment in this case did not charge the defendants with **defrauding** the United States or any of its agencies nor with conspiracy to **defraud** the United States. Petitioners were only charged with conspiracy to attempt to evade or defeat taxes, or in other words, conspiracy to violate a section of the Internal Revenue Code. Nevertheless the trial court instructed the jury that even "if you should find that defendants or either of them filed a false return, yet before you can find the defendants guilty under the indictment in this case it is necessary that you find and believe beyond a reasonable doubt that in addition to the filing of the return, the defendants also conspired to commit some affirmative and **positive act of fraud** in connection with the corporate income tax return for the Twin City Distributing Co." (R. 164). Such charge was not contained in the indictment and thus the appellants were placed upon trial upon a charge not made in the indictment, to-wit: conspiracy to defraud the United States. The result was to deprive them of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

A similar situation arose in **Cole v. Arkansas**, 333 U. S. 196, where this Court said:

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. DeJong v. State of Oregon, 299 U. S. 353, 362, 57 S. Ct. 255, 259, 81 L. Ed. 278."

Here by the charge of the court the defendants were being tried for defrauding the United States, or an agency thereof, which was not charged in the indictment.

The jury could easily have believed, however, that the alleged failure to pay income tax or evade or defeat income tax, as charged in the indictment, was also defraud-

ing the United States, regarding which there was no charge in the indictment. This, we believe, is plain error on the face of the record, of which this court should take notice of its own motion. And we believe the error is so fundamental as to require this court to set aside and vacate the judgment below. **Screws v. United States**, 325 U. S. 107.

In **Terminiello v. Chicago**, 337 U. S. 1, 5-6, the Court said:

> "The verdict was a general one; and we do not know on this record but what it may rest on the invalid clauses.
>
> "The statute as construed in the charge to the jury was passed on by the Illinois courts and sustained by them over the objection that as so read it violated the Fourteenth Amendment. The fact that the parties did not dispute its construction makes the adjudication no less ripe for our review, as the Stromberg decision indicates. We can only take the statute as the state courts read it. From our point of view it is immaterial whether the state law question as to its meaning was controverted or accepted. The pinch of the statute is in its application. It is that question which the petitioner has brought here. To say therefore that the question on this phase of the case is whether the trial judge gave a wrong charge is wholly to misconceive the issue.
>
> "But it is said that throughout the appellate proceedings the Illinois courts assumed that the only conduct punishable and punished under the ordinance was conduct constituting 'fighting words'. That emphasizes, however, the importance of the rule of the Stromberg case. Petitioner was not convicted under a statute so narrowly construed. For all anyone knows he was convicted under the parts of the ordinance (as construed) which, for example, make it

an offense merely to invite dispute or to bring about a condition of unrest . . ."

5. It is important that this Court grant a hearing to determine whether the dismissal of Count One, which charged the substantive offense at the close of the Government's case operated to acquit petitioners under Count Two, which charged a conspiracy to commit the offense under Count One, when the evidence adduced to sustain the charge under each count was the same, and the two offenses were in fact identical. Both the doctrines of res judicata and double jeopardy should have forbade the Court to go forward with Count Two after the dismissal of Count One. The Government's evidence in this case was based on the theory that a false and fraudulent return was filed and that it was circumstantial evidence showing a conspiracy between petitioners to conspire to evade the corporation tax. If each count had been tried separately it would be clear that an acquittal or a dismissal under Count One after petitioners were in jeopardy would operate to bar a subsequent trial under Count Two. An acquittal of conspiracy at one trial precludes a subsequent prosecution for commission of the substantive offense where the basic facts supporting each conviction are the same and are identical. **Sealfon v. United States**, 332 U. S. 575. If the substantive offense and the conspiracy are identical an acquittal or dismissal after jeopardy bars a subsequent prosecution on the ground of double jeopardy. **Pereira v. United States**, 347 U. S. 1, 11. See also **Pinkerton v. United States**, 328 U. S. 640, 643-644. And it is not even essential that a verdict of guilt or innocence be returned for a defendant to have been once placed in jeopardy so as to bar a second trial on the same charge. **Green v. United States**, 355 U. S. 78; **United States v. Ball**, 163 U. S. 662, 671. It would seem that this case should not be considered to be different for the purposes of former jeopardy than if each count had been tried successively at two separate trials.

6. Petitioners filed motions to strike allegations from the indictment which charged that defendants used "pressure and coercion in their methods of soliciting customers" and that defendants "compelled, by the use of the medium of fear various cigarette vendors * * * to have cigarettes sold by said vendors * * * stamped by said corporation" on the ground that these allegations were immaterial to the offense charged, and were an attempt to place before the jury incompetent matters relative to other alleged misconduct on the part of defendants (R. 6, 8-9, 10-11). Petitioners again prior to the opening statement on behalf of the jury objected to the reading of these allegations in the indictment to the jury stating to the Court that the government had no evidence to support this charge but the Court overruled this contention (R. 11-12). The Government thereupon read the indictment during its opening statement (R. 19-20) and the Court also read these allegations to the jury in its charge (R. 150).

Rule 7 (d) of the Federal Rules of Criminal Procedure authorizes a Court on motion of a defendant to strike surplusage from an indictment, and such a motion has been held to be the remedy for unnecessary allegations of an indictment which add nothing to the charge, **United States v. Hood**, 5 Cir., 200 F. (2d) 639, 642. The purpose of this rule is to protect a defendant against prejudicial allegations of immaterial or irrelevant matters. Notes of Advisory Committee on Rules. Apparently, these allegations in the instant case were placed in the indictment by an overzealous prosecutor for "color" or "background". See also **United States v. New York Great A. & P. Tea Co.**, 5 Cir., 137 F. (2d) 459, 462; **United States v. Klein**, S. D. N. Y., 124 F. Supp. 476, 479-480.

These allegations in the indictment were read to the jury during the plaintiff's opening statement and in the Court's charge and suggested to the jury other misconduct on the part of defendants. No evidence supported

these allegations and they had nothing to do with the conspiracy charged. Thus, extraneous matter of a highly prejudicial nature charging other offenses against appellants was brought before the jury. It was, therefore, error not to strike these allegations and to call them to the jury's attention. Cf. **Michelson v. United States,** 335 U. S. 469.

7. Important questions of criminal law are presented to this court in its supervisory powers on whether the admission into evidence of events of September 11, 1953, as set out in our questions raised were so prejudicial as to deny the appellants fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

8. An important question of law is also raised as to whether the defendant, Giardano, was prejudiced by failure of the court to instruct the jury that he is under no duty to file any return and that only designated officers of the corporation were under such a duty.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,683

Anthony Giardano, Appellant,
v.
United States of America, Appellee.
} Appeal from the United States District Court for the Eastern District of Missouri.

No. 15,684

Anthony Lopiparo, Appellant,
v.
United States of America, Appellee.
} Appeal from the United States District Court for the Eastern District of Missouri.

[January 8, 1958.]

Morris A. Shenker and Morris Lavine, for Appellant, Anthony Giardano. Morris Lavine filed separate brief for Appellant Anthony Giardano.

Sidney M. Glazer (Mark M. Hennelly with him on the brief), for Appellant, Anthony Lopiparo.

Wayne H. Bigler, Jr., Assistant United States Attorney (Harry Richards, United States Attorney and Murry L. Randall, Assistant United States Attorney, were on the brief) for Appellee.

Before GARDNER, Chief Judge, and WOODROUGH and VAN OOSTERHOUT, Circuit Judges.

WOODROUGH, Circuit Judge.

Appellants, together with Twin City Distributing Company, a corporation, and Ralph Caleca, were charged in the first count of a two count indictment with the substantive offense of willfully attempting to evade a part of the federal taxes due from the corporation for the fiscal year ended March 31, 1953, by filing a false corporation tax return and in the second count with conspiring to willfully attempt to evade the same taxes by certain means set forth in detail and committing certain overt acts to effect the object of the conspiracy. Pleas of not guilty were entered and at the conclusion of the government's evidence on the trial of the case, the first count was dismissed by the government. The jury found appellants guilty on the second count and each was sentenced to four years imprisonment and a fine of $5,000.00. They prosecute separate appeals, submitted and considered together on one record.

The second count of the indictment, after charging the conspiracy in general terms, included the following:

> "It was a part of said conspiracy that said defendants, well knowing that there was in full force and effect within the City of St. Louis, Missouri, an ordinance levying a tax upon the sale at retail of cigarettes, and that payment of the tax thereon was required to be shown by the use of a stamp imprinted upon all packages of cigarettes so sold, did plan and arrange for the use of a false, forged and counterfeited cigarette tax stamp die for the purpose of stamping the City of St. Louis tax stamp impression, purporting to show payment of the tax, on cigarette packages. That defendants did further use pressure and coercion in their methods of soliciting customers of said corporation and did collect from such customers various charges for services in stamping cigarette packages to show payment of the City of St.

Louis cigarette tax, and for their charges for such services did plan and arrange to receive from said customers check payments for a small portion of such stamping charges incurred by such customers and cash payments for the larger portion of such charges so incurred by said customers. That defendants did plan to issue to their customers a receipt covering check payments for such stamping charges and to issue no receipt covering the cash portion of the payment for such charges, and did further plan that such cash payments would be omitted and not shown or recorded in the books and records of said corporation, but did arrange to have check payments made to the bookkeeper of said corporation and record in its books and records only such payments, while cash payments were to be made directly to said defendants who would arrange to deposit only check payments in the corporation's depository and use all cash payments for their respective, direct and indirect, personal use and benefit."

"It was further a part of said conspiracy that defendants did plan and arrange to induce the customers of said corporation to refrain from keeping any records showing cash payments made to defendants, the purpose and plan of said conspiracy being that said defendants would prepare and cause to be prepared and filed with the Director of Internal Revenue, St. Louis District, at St. Louis, Missouri, a false and fraudulent tax return for and on behalf of the said corporation for the fiscal year ended March 31, 1953, wherein such tax return would state that the net income of said corporation for said fiscal year was far less than it actually was and that the tax due from said corporation to the United States of America was far less than the amount of tax actually due."

Eight overt acts charged to effect the object of the conspiracy were in substance: (1) that appellants compelled various cigarette vendors, by the use of the medium of

fear, to have cigarettes sold by them stamped with the City of St. Louis tax stamp by the Twin City Distributing Company; (2) appellants used a counterfeit cigarette tax stamp impression for such stamping; (3) appellants received payments in cash in the amount of $27,881.00 more or less for affixing the tax stamp impression on cigarette packages and failed to record the amounts so received on the corporation books; (4) appellants demanded that payments for the service of stamping cigarette packages be made partially by check, for the smaller portion of the charges, to the bookkeeper of the corporation and partially by cash for the greater portion of the stamping charges incurred, such cash payments to be made to either or both appellants; (5) appellants caused receipts to be issued to customers for payments made by check to the corporation for the stamping and caused no receipt to be issued for cash payments therefore; (6) appellants instructed a customer not to keep any record of the cash payments made to appellants for tax stamping by said customer; (7) appellants caused check payments to be placed in the corporation's depository and cash payments to be withheld from said depository; (8) Anthony Lopiparo and Ralph Caleca as President and Secretary-Treasurer of said corporation filed and caused to be filed the United States Corporation Income Tax Return of the corporation for the fiscal year ended March 31, 1953, with the Director of Internal Revenue at St. Louis, Missouri.

No evidence was adduced by either of the defendants on the trial. They rested at the conclusion of the government's evidence and moved the court "to enter a judgment of acquittal as to Count 2 of the indictment for the reason that the evidence is insufficient to sustain a * * * judgment of conviction." They did not specify in the motion any particulars in which they claimed the evidence to be insufficient and the court reserved ruling on the motion. After the verdict of guilty was returned the motion was

renewed, argued and over-ruled. The refusal to order acquittal for insufficiency of the evidence is here assigned as error and we have examined and fully considered the evidence with respect to its sufficiency.

We find that each material element of the charge of the second count of the indictment against these appellants is supported by sufficient evidence. It is clearly shown that the three individuals charged as defendants were associated first as partners and then as owners and managing officers of the defendant corporation and were engaged in their business in selling cigarettes through vending machines and to others who sold through such machines in the St. Louis area, city and county. They occupied a store at 6146 Delmar in St. Louis and employed a lady there to keep the books for the business. They also employed an accountant to audit the books and make out the corporation federal income tax return from the books he audited. Then they carried on the business in such a way that a substantial part of the income derived from it would not be known to the bookkeeper or the auditor and would not be entered on the books and would, therefore, be and it was knowingly and willfully omitted from the corporation income tax return with intent to evade that part of the income tax that became due for the period by reason of the receipt of it.

The omitted income was obtained by defrauding the City of St. Louis in respect to the tax which the City imposed of two cents per package of cigarettes sold within the area. Payment of the city tax was required to be shown by the use of a stamp imprinted upon each package of cigarettes so sold and such imprinting was done by means of a machine referred to as a Pitney-Bowes machine. The defendants had such a machine and the proof was clear that a false, forged and counterfeited cigarette stamp die was provided and used. Defendants obtained cash from

sales of their own cigarettes sold through their vending machines and cash payments and payments by check for tax stamping charges on packs of cigarettes from at least seven identified customers who sold through vending machines in St. Louis. Defendants induced those customers partly by use of the medium of fear and partly by charging them a cut rate, which was only a fraction of the true amount of the city tax, for impressing the tax stamp on the cigarette packages. The payments which the customers made by check for the stamping done for them were at lawful rates and were disclosed to the bookkeeper, included in the accounts and consequently in the income tax return of the corporation, but the cash payments were concealed and omitted from the tax return. The evidence was that instead of receiving about $16,000.00 from the other cigarette vendors in the city for tax stamping during the period, as reported to the auditor and shown on the books, defendants received approximately $44,000.00 from that source. The question whether the defendants intended to evade the federal income tax in respect to the cash they obtained and willfully omitted to have included in the corporation's tax return, was for the jury and its verdict against them was supported by the evidence.

It is contended for appellant Giardano that he was merely a minority stockholder of the corporation taxpayer; that he did not sign its income tax return or keep or inspect or know the contents of its books and, therefore, did not conspire to attempt to evade the taxes due from the corporation. But the contention is without merit. Giardano, Lopiparo and Caleca were clearly shown to have cooperated in carrying on the scheme for defrauding the city and obtaining payments for the tax stamping of cigarette packs and in separating the legitimate check payments, disclosed to the bookkeeper and accounted for in the income tax return, from the concealed cash payments. The jury could fairly infer from the nature of the scheme and

the way the defendants operated it that each of them knew and conspired to willfully accomplish the necessary consequence that the corporation books and the income tax return compiled from the books would omit the income tax due on account of the part of the income which was concealed from the bookkeeper and from the auditor employed to make out the income tax return from and in accordance with the corporation's books. The jury could also fairly infer from the evidence that the defendant Giardano planned and conspired, as charged, to willfully attempt to evade the income tax of the corporation due for the period in question.

Other points argued for reversal of the judgment of conviction are to the effect: (1) that there was not sufficient evidence of the commission of either of the alleged overt acts charged in the indictment numbered 1, 2, 6, 7, and 8; (2) that the court erred in admitting in evidence exhibits numbered 2, 11, 28, 30, 34, 38, 40 and 41; (3) that the court erred in instructing on the word "willfully"; (4) that the court erred in refusing to give defendant's requested instructions 7 and 10; (5) that the court erred in failing to read to the jury the statutory definition of the crime of willfully attempting to evade and defeat federal taxes; (6) and that the court erred in charging the jury that it was not incumbent on the prosecution to prove that all the means set out in the indictment were in fact agreed upon to carry out the conspiracy.

1. As to the alleged overt acts claimed to be unsupported.

Overt act one, Compulsion by medium of fear. Credible evidence was adduced by the government that seven cigarette vendors doing business in St. Louis were approached by appellants and solicited to get their cigarettes stamped by the Twin City company, in part for cash payments and in amounts much less than the prescribed city tax and in part for full payment of the city tax, by check. When

those solicited refused, some of their vending machines would be removed and the company's machines substituted. Another approach and solicitation would follow and in instances there were repeated refusals and substitutions of vending machines until those solicited succumbed and joined the scheme. On occasion as many as three men went together to make the approach and solicitation. The charge of compulsion by the medium of fear at least of economic loss, was sufficiently supported.

Overt act two, Use of counterfeit stamp. The proof that a counterfeit cigarette tax stamp die was used for the purpose of stamping the city cigarette tax stamp impression on cigarette packages was made by a Mr. Madenford, who was employed by the manufacturers of the Pitney-Bowes machine used by the city of St. Louis. He had examined probably hundreds of thousands of cigarette tax meter impressions and he demonstrated that some of the packs of cigarettes proved to have been bought from vending machines licensed to the Twin City company bore tax stamps which were all alike and were forged and counterfeit. The discovery that the tax stamp die so used in the defendant's vending machines was counterfeit was not made until September, 1953, but it afforded the only and sufficient explanation of the precise means by which the conspirators had obtained the income they sought to evade. The proof was clearly competent and supported the allegations of the indictment as to the plan of the conspiracy and as to overt act numbered 2.

Overt act seven. As to the depositing of payments made by check to the Twin City company for tax stamping and withholding from deposit the cash payments. The company's books showed $163,790.00 received from vending machines and $23,387.00 from wholesale sales and stamping for others. The tax return showed $187,188.00 as total receipts not broken down. The books were not available and both the company accountant and the revenue agent

testified from transcripts of the monthly receipts totals, the dealers' stamping ledger and vending machine and cash sales totals.

Six of the dealers testified that they paid $26,175.00 in cash for cut rate stamping, mostly to appellants for which they got no receipts. Their legal rate payments receipted for totaled $11,810.00. The transcript of the company's dealer ledger showed within a few dollars of the same sum, namely $11,874.00 received from six of the same dealers. The seventh dealer was not a witness. He was listed on the company books as having paid $3,950.00. The testimony of the revenue agent was that the dealers had made cut rate cash payments to Twin City in the period in question amounting to $26,175.00 and that if the amount had been included in the return, the tax should have been $14,177.00 instead of $2,503.00 reported. The proof as to overt act numbered 7 was sufficient.

Overt act eight. As to the filing of the company's tax return. It is contended for Giardano that the court erred in receiving the corporation tax return in evidence against him as he did not prepare, sign or file it, but the contention is without merit. His participation in the conspiracy shown by numerous acts in managing and directing the corporation in association and co-operation with the other defendants was established by competent and sufficient evidence and he was bound by the acts done by his co-conspirators to effect the object of the conspiracy. The filing of the false corporation return by his associates, the appellants who signed it, was such an act. It was properly received in evidence against all defendants.

Overt act six. Under this number the indictment charged that appellants instructed a customer not to keep any record of cash payments made for the cut rate tax stamping by defendants and it is admitted that the record does not contain direct evidence of the giving of such an

instruction to any customer. But the scheme the defendants were charged with carrying on and were shown to have carried on to defraud the city of St. Louis in respect to its cigarette tax necessarily involved secrecy on the part of all participants and the proof, both as to defendants and as to the customers, showed such secrecy was observed. It was fairly inferable from all the circumstances that the defendants included the feature of secrecy in their exposition of the scheme for lessening the city cigarette taxes their customers would have to pay when they drew the seven customers into it. It is also clear that the defendants committed a large number of overt acts to effect the object of their conspiracy including the other seven overt acts specified in the indictment and it is not conceivable that the jury found none against them, save only the one that is numbered six.

Here the declaration of the court in **Gilson v. U. S.**, 258 F. 588, 590, is applicable. The court said: "In this case no injustice was done. The evidence was such as to require the submission of the case to the jury and it is in our opinion a very far fetched suggestion that the jury might have attached importance to an unproved overt act when there were so many (far more than the indictment numbers) overt acts amply shown by the evidence submitted to them." The lack of direct proof in respect to the overt act numbered six was without prejudice to defendants.

2. As to the admission of the numbered exhibits.

In September, 1953, city police officers made purchases of cigarettes from vending machines throughout the city which were licensed to the defendant company and examination of the packages and the tax stamps on them by an expert witness disclosed that a counterfeit die had been used in stamping them. The serial number of the tax stamping machine possessed and used by defendants was

23914, and the tax impression on the bottom of cigarette packs bearing that number bought from machines licensed to the defendant company was proved to be false and counterfeit. The exhibits complained of identified tax stamped packs of cigarettes so purchased and the original tax impression sheet of defendant's tax meter numbered 23914 produced by the manufacturer of the machine.

The appellants contend that the clear and convincing proof of the use of the counterfeit tax stamping die to reduce payments of cigarette taxes due the city for the profit of the defendant corporation was inadmissible because the discovery of the counterfeit was not made until after the end of the tax year ending March 31, 1953. But the contention is without merit. Up until the demonstration of the use of the counterfeit die, the evidence showed only that defendants were stamping cigarettes as city tax paid in consideration of the payment to them of thousands of dollars less than the amount of the tax and thriving. A reasonable inference from that evidence was that they were in some way defrauding the city of their profit. But when their possession and use of the counterfeit tax stamp die was proven, their whole scheme, including the intent, was disclosed beyond peradventure. The proof of the use of the counterfeit die was plainly admissible notwithstanding the tardiness of its discovery.

3. As to the word "willfully".

We find no error in the court's definition of the word "willfully". In the context of the charge against defendants and the instructions given to the jury, the word meant as stated by the court, "intentionally, that is, not accidentally and it connotes and carries with it the idea of knowledge of the criminality of the act alleged to have been committed by either of the defendants." The word was used throughout in conjunction with "unlawfully", "knowingly" and "feloniously" and there was no preju-

dice to defendants in respect to the definition given by the court.

4. As to the refusal to give requested instruction number ten which read:

> "Even though you may find and believe from the evidence that defendants, or either of them, did plan and arrange to receive from customers of Twin City Distributing Co., check payments for a portion of its charges for services in stamping cigarette packages and cash payments for portions of such charges so incurred by said customers, and did not issue a receipt covering the portions of the payment in cash and did issue receipts for the portion of the payments by check for such charges, it is still your duty and you must acquit each of the defendants unless you find and believe from the evidence that defendants conspired to defeat and evade the income tax liability for the Twin City Distributing Co., for the fiscal year ending March 31, 1953."

The substance of this requested instruction was fully and completely covered by the instructions given by the court in which all of the elements necessary for them to find beyond a reasonable doubt in order to convict were defined and explained. There was no error in refusal of the request. **Feigenbutz v. United States**, 8 Cir., 65 F. 2d 122.

As to the refusal to give requested instruction number seven which read:

> "The Internal Revenue law allows a corporate taxpayer to compute its taxable income on the basis of a fiscal year period only if the taxpayer both keeps adequate books of account and has an annual accounting period. If a corporate taxpayer does not comply with these two conditions, it must compute its income on the basis of a calendar year period."

"The instant indictment charges a conspiracy to defeat and evade the income tax for the fiscal year, April 1, 1952 to March 31, 1953. Before you can convict defendants, it is necessary that you find and believe from the evidence that the Twin City Distributing Co., both kept adequate books of account and had an annual accounting period, and therefore, was entitled to file a tax return for the fiscal year mentioned in the indictment rather than for a calendar year period."

We do not find any correct statement of the law applicable to the case contained in the requested instruction and there was no error in refusing to give it.

5. As to the fact that the court did not read Section 145(b) Title 26 United States Code to the jury.

The first count of the indictment charged a violation of that section substantially in its terms and was read to the jury during the opening statement of the prosecutor. He stated it and how it would be proved. In the course of the instructions the court clearly explained and defined every ingredient of the offense necessary to be proved beyond a reasonable doubt in order to convict. The only inference to be fairly drawn from the whole record is that by the time the court came to instruct the jury it appeared to be superfluous to read the words of section 145(b). Accordingly no request was made to have them read either when the instructions were first given or upon the repetition of them which was accorded at the request of the jury.

On trial of conspiracy to steal a horse it might not be inappropriate to read the statute against stealing, but a fair trial might well be afforded without such reading. In this case there is no reason to infer that any prejudice could have been caused by defendant by not reading the words of the statute against willfully attempting to evade a federal tax. The content of the statute was clearly before the jury. It was not reversible error that the court

did not read the section, absent any request of defendant to do so. **United States v. Heine**, 2 Cir., 149 F. 2d 485; **United States v. Capitol Meats**, 2 Cir., 166 F. 2d 537, Cert. denied, 68 S. Ct. 1018; **Lewis v. United States**, 10 Cir., 49 F. 2d 272. Though certain cases cited in the foregoing decisions would lead to a contrary conclusion, we are not in accord with them.

6. As to the necessity to prove all the means of effecting the object of the conspiracy set out in the indictment.

The court explained to the jury through many paragraphs of instructions exactly what were the essential elements of the conspiracy with which the defendants were charged. The indictment was read to them and the court defined precisely what had to be proved beyond a reasonable doubt in order to justify convicting. It was made clear that the gist of the conspiracy charged was the common purpose to willfully evade the federal tax. The paragraph of the instructions now attacked is the following:

> "It is, therefore, necessary as to Count 2 of the indictment, before you can convict the defendants, or either of them, that you find beyond a reasonable doubt that there was a conspiracy, and that the acts charged to have been committed by the defendants were intentionally committed by the defendants pursuant to the conspiracy, and that the acts were committed for the purpose and object of advancing the conspiracy charged, and with knowledge that if the plan of the conspiracy was accomplished, the conspiracy would directly and substantially affect the income tax liability of the Twin City Distributing Company for the fiscal year ending March 31, 1953, by substantially reducing the net income and the amount of income taxes the corporation would owe, and was known to the defendants when they entered into the conspiracy."

"It is not enough for the prosecution to show the evidence of an agreement and the membership therein of any particular defendant. This alone would not prove that such defendant participated in the agreement knowingly and willfully. With respect to each defendant the prosecution has the further burden of proving with respect to Count 2 of the indictment beyond a reasonable doubt that such defendant participated in such agreement willfully. If you are not convinced beyond a reasonable doubt that such defendant acted willfully, then your verdict must be not guilty."

"It is not incumbent upon the prosecution to prove that all the means set out in the indictment were, in fact agreed upon to carry out the conspiracy, or that all of them carried out and put it in operation. It is sufficient if it be established to your satisfaction and beyond a reasonable doubt that the ones described in the indictment, as I have referred to, were agreed upon to be used to effect the conspiracy, and were used."

The means for evading the tax to which the court referred in the quoted paragraphs were set out in a prior paragraph of instructions, as follows:

"It is the position of the prosecution that the defendants entered into an agreement with each other and others, the purpose of which was to evade and defeat a large part of the income taxes to be due and owing, and due and owing to the United States of America by the Twin City Distributing Company for the fiscal year ending March 31, 1953, as charged in Count 2 of the indictment, and that the defendants and each of them were officers and stockholders of the Twin City Distributing Company; that said defendants knew there was in full force and effect within the City of St. Louis, Missouri, an ordinance levying a tax upon the sale of cigarettes, and that payment of the

tax thereon was required to be shown by the use of a decal or stamp imprinted upon all packages of cigarettes so sold, did plan and arrange for the use of a false, forged and counterfeited cigarette stamp tax die for the purpose of stamping the City of St. Louis tax stamp impression, parporting to show payment of the tax, on cigarettes; that defendants solicited customers of said corporation and did collect from such customers various charges for stamping cigarette packages to show payment of the City of St. Louis cigarette tax, and for such stamping did receive from said customers payments for such stamping charges, and did further plan that such cash payments should be omitted or not shown in the books and records of said corporation; and that the defendants did prepare and cause to be prepared a false and fraudulent tax return on behalf of said corporation for the fiscal year ending March 31, 1953, wherein such tax return stated that the net income of said corporation for said fiscal year was substantially less than it actually was, in that some $26,175.00 of the money received by the corporation was omitted from the books, and that as a result of the omission from the books the net income, and the tax due from said corporation to the United States of America as a result of the omission of the said $26,175.00 as income was substantially less than the amount of tax actually due."

We find no merit in the assertion of error in respect to these instructions. There was without serious question substantial evidence that defendants used all the means described by the court to effect the object of the conspiracy. We are also of the opinion that the evidence to support the remaining allegations of the indictment here attacked as unsupported was substantial, i. e.

"It was further a part of said conspiracy that defendants did plan and arrange to induce the customers of said

corporation to refrain from keeping any records showing cash payments made to defendants."

It was shown that defendants gave no receipts for the cash payments made to them and none of the customers kept any record of such payments with the possible exception of Routman and Presley. Routman testified, "We kept a memorandum of this additional money (the cash payments) in order to keep track of our own books. • • •." The memorandum "was not one of the books that were used in the bookkeeping in my office." Presley said, "I know by check stubs that those particular checks are the ones I made out and got cash for for Twin City purposes. It is my only way of telling." In view of the proof of the character of the fraud on the city being carried on by defendants, it was fairly inferable from the evidence that the quoted allegation of the indictment was true.

Others matters have been ably argued at the bar and in the briefs which have been fully considered but do not require further discussion.

We hold that the judgments appealed from are without error and should be and are in all respects,

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment.

United States Court of Appeals for the
Eighth Circuit.

No. 15683. September Term, 1957.

Wednesday, January 8, 1958.

Anthony Giardano, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the
Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Anthony Giardano, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

January 8, 1958.

Judgment.

United States Court of Appeals for the Eighth Circuit.

No. 15684. September Term, 1957.

Wednesday, January 8, 1958.

Anthony Lopiparo, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Anthony Lopiparo, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

January 8, 1958.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 909.

ANTHONY GIARDANO and ANTHONY LOPIPARO,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 909.

ANTHONY GIARDANO and ANTHONY LOPIPARO,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

ARGUMENT.

1. The Government is in error in contending that the arguments relative to the instructions with one exception were not raised in the Court of Appeals. A Supplemental Brief, filed by leave of the Court of Appeals, set forth both the argument that the jury was not specifically instructed that unanimity is essential as to any particular overt act

found and the argument that the verdict should be set aside because the jury was not required to find specially the overt act on which the verdict rested. The contention that the charge was so framed that petitioners could have been convicted of an offense not charged in the indictment was presented in the Court of Appeals in the Opening Separate Brief on appeal for Anthony Giardano (pp. 10-13). All points relative to the instructions were, therefore, presented to the Court of Appeals.

Petitioners excepted to the instructions in the trial court which allowed the jury to convict if they found that only one of the overt act alleged was committed (R. 171-172). The other errors urged are within the ruling of **Screws v. United States**, 325 U. S. 91, 107, which holds that the trial judge is under a duty to instruct on the fundamental rules of law. After all the trial judge is no mere automation sitting on the bench with no duties to perform. See also **Wiborg v. United States**, 163 U. S. 632, 658; **Mills v. United States**, D. C. Cir., 228 F. (2d) 645, 646; **Morris v. United States**, 9 Cir., 156 F. (2d) 525, 527; **United States v. Levy**, 3 Cir., 153 F. (2d) 995, 998.

Even the Court of Appeals acknowledged that the jury was not fully instructed when it concluded that since Section 145 (b) "was read to the jury during the opening statement of the prosecutor" (Pet. 33), there was a sufficient statement of the law when it retired to deliberate. The court below found that it "appeared to be superfluous to read the words of section 145 (b)" (Pet. 33).

The Government's statement that the jury was told that their verdict must be unanimous overlooks the fact that the jury was not expressly instructed that their verdict must be unanimous for each overt act or acts found. This is apparently the first time this issue has been squarely raised before this Court other than in a treason case or a case involving constitutional issues. In those cases, the

Court has held that there must be unanimity on each of the overt acts. See **Cramer v. United States**, 325 U. S. 1, 35, footnote 45, **Stromberg v. California**, 283 U. S. 359, 368; **Terminiello v. Chicago**, 337 U. S. 1, 5.

2. The Government says that the jury was not allowed to convict petitioners by finding a legally insufficient overt act. It contends that the finding of the overt act of the mere filing of a corporate return (not a false return) is sufficient because "the allegation of the overt act—that the return was filed—makes plain that the means alleged were employed". Brief for the United States in Opposition, p. 14. The deficiency in that argument is that it eliminates the requirement of an overt act. Conspirators may make an illicit agreement and yet not commit an overt act in furtherance of their plan. Moreover, the court below, over objection, charged the jury that it was not incumbent upon the prosecution to prove that all of the means set out in the indictment were in fact agreed upon to carry out the conspiracy (R. 163).

3. The issue as to double jeopardy and res judicata was raised in oral argument in the court below and in the petition for rehearing. Appellants' Petition for Rehearing, pp. 2-3. A dismissal of a charge after it has been tried has been held to be tantamount to an acquittal. Cf. **People v. Cage**, 48 Cal. 323; **People v. Webb**, 38 Cal. 467; **People v. Hunckler**, 48 Cal. 331. With respect to collateral estoppel by judgment, that problem was considered by this Court recently in **Yates v. United States**, 354 U. S. 298, 335-338.

4. There was no credible evidence to support "the charge of compulsion by the medium of fear." The evidence only showed that the customers of the tax stamping service lost some vending machine locations by ordinary business competition (R. 69, 105-106, 103, 86). And most of their losses

were to other dealers not connected with the Twin City Corporation. The loss of business by ordinary business competition not of such a nature as to amount to unfair competition is not sufficient to show "compulsion by the medium of fear." Such an allegation is unnecessary and prejudicial to a charge of conspiracy to attempt to evade taxes.

This Court should exercise its supervisory jurisdiction over criminal justice by granting a hearing and determining the issues presented by this case.

CONCLUSION.

For the reasons set out above and those set out in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

SUPPLEMENTAL ANSWERING BRIEF.

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IN THE

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SUPPLEMENTAL ANSWERING BRIEF.

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Two points of fundamental importance in the administration of criminal justice in this case call for the decision of this Honorable Court. Neither has been passed on with finality by this Court so as to give supervisory jurisdiction of this Court in the administration of criminal justice.

I.

The failure of the court to instruct the jury on the crime which it is alleged was conspired to be committed calls for a hearing and reversal of the decision of the court of appeals by this honorable court.

II.

This court has never passed upon the question of unanimity of verdict in a conspiracy case to be required as to the overt acts alleged as being in furtherance of the conspiracy and whether the jury must, of necessity, be instructed that they must be unanimous as to the particular overt act or acts upon which they agree as being in furtherance of the conspiracy, or whether special verdicts are required in a conspiracy case where several overt acts are alleged in order that the court may know, upon the return of the general verdict, whether the jury has actually been unanimous.

I.

The failure of the court to instruct the jury on the crime which it is alleged was conspired to be committed calls for a hearing and reversal of the decision of the Court of Appeals by this honorable court.

The conspiracy statute of the United States is very broad. Anyone who conspires to commit a crime found in any one of the penal statutes of the United States is guilty of the crime of conspiracy, but is it possible to charge a jury only as to the law of conspiracy without charging what the crime is that it is alleged that the defendant conspired to commit? In **Screws v. United States**, 323 U. S. 91, the defendants were charged with the substantive offense itself, of violation of then Section 20 of the Federal Criminal Code making it an offense willfully to deprive one, under color of law, of rights, privileges and immunities secured to him by the Constitution and laws of the

United States, and also conspiring to violate such statutes based upon the fatal beating of a person under arrest. The Court in that case failed to instruct the jury as to one word, "willfully," and as to the issue of intent. No exception was taken to the charge as required at that time. This Supreme Court said:

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed." 325 U. S. 107, 89 L. Ed. 1508.

As pointed out in the Screws case further, "It is only State action of a 'particular character' that is prohibited by the Fourteenth Amendment and against which the Amendment authorizes Congress to afford relief." Likewise it is only for a specific crime, which is charged as the crime conspired to be committed, that a defendant can be placed upon trial. But here the jury was not told by the Judge what the crime was. The Court of Appeals seemed to think that because the District Attorney told the jury what he was going to try in his opening statement, that that was sufficient. Certainly what the lawyers say to the jury in any of their statements is neither evidence nor instructions. The jury was never instructed by the Judge as to the crime which the appellants were charged with having conspired. This fact alone calls for the supervisory action of this Honorable Court.

A second point of great importance requiring the supervisory determination of this Honorable Court is that of unanimity of the jury's verdict.

The sole charge in this case was conspiracy, with eight overt acts. This is the first case which this Honorable

Court has had before it aside from the treason cases where the unanimity as to the overt acts has been a matter of this Court's consideration. In the case of **Cramer v. United States**, 325 U. S. 1, this Court held that the verdict in this case had to be set aside if any of the separable acts admitted to the jury is insufficient to support the verdict where, the verdict being a general one without special findings, it is impossible to identify the grounds of the conviction. See footnote 45. But we think the law in conspiracy cases is analogous and that this Court should grant certiorari and so determine. An instruction to the jury, without telling the jury that it must be unanimous on the overt act or acts on which it agrees, would leave the situation open to where two jurors might believe one overt act, four another, another juror believe another overt act, and still another juror believe overt acts, but none of them unanimous on the particular overt act on which the conviction is based. The result of the Cramer case was to bring about special verdicts in treason cases where several overt acts were charged, with instructions that the jury should be unanimous on the overt acts on which they agreed. We think that this should be the law in conspiracy cases also.

In **Andres v. United States**, 333 U. S. 740, this Court reversed a verdict as a result of a trial in which doubt as to the adequacy of the instructions was resolved in favor of the accused, and this Court held that unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In that case the Court held that unanimity both as to guilt and punishment must be had. The Court held that the jury should be instructed that the unanimity must be both on the issue of guilt and on the issue of the punishment. Otherwise the instructions were inadequate. We respectfully contend that likewise in the conspiracy case, where the jury is merely instructed that their verdict must be unanimous, this is an insufficient instruction; that they must be unanimous as to each of the overt acts or

such overt acts on which they find the defendant guilty before they can return a verdict. In a concurring opinion in the Andres case, Mr. Justice Frankfurter said, in discussing the avoidance of confusion:

> "On the other hand, conscientious jurors are not likely to derive clear guidance if told that 'on both guilt and punishment they must be unanimous before any verdict can be found.' They should be told in simple, colloquial English that they are under duty to come to an agreement, if at all possible within conscience, for a verdict must be unanimous; that a verdict involves a determination not only of guilt but also of the punishment that is to follow upon a finding of guilt; that a verdict as to both guilt and punishment is single and indivisible; that if they cannot reach an agreement regarding the sentence that they should follow a finding of guilt, they cannot render a verdict; and this means that they must be unanimous in determining whether the sentence should be death, which would follow as a matter of course if they bring in a verdict that the accused is found guilty of the crime of murder in the first degree." **Andres v. United States**, 333 U. S. 766, 92 L. Ed. 1070.

Likewise, in the instant case the jury should be instructed that they must be unanimous on the overt act which they find, if they do find the defendant guilty of an overt act, and otherwise they cannot return a verdict. We regard this as one of the most fundamental questions of criminal law which has not been but should be, passed upon in a conspiracy case by this Honorable Court. We reassert all of the points set out in the joint Petition for Certiorari, being filed out of St. Louis by Morris Shenker and this author.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1957

ANTHONY GIARDANO AND ANTHONY LOPIPARO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 21-37) is reported at 251 F. 2d 109.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1958. (Pet. 39.) A petition for rehearing was denied on February 10, 1958. On March 1, 1958, by order of Mr. Justice Whittaker, the time for filing a petition for certiorari was extended to April 10, 1958. The petition was filed on April 9, 1958. The jurisdic-

tion of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the court's charge or failure to charge in several respects now complained of was plain error of a character which this Court ought to notice in the absence of objections in the trial court.

2. Whether one of the overt acts alleged in the indictment charging conspiracy to evade taxes was legally insufficient and another unsupported by the evidence.

3. Whether, under the doctrines of double jeopardy and *res judicata*, dismissal by the Government at the close of the evidence of the count charging petitioners with tax evasion barred their conviction in the same proceeding on the count charging conspiracy to evade taxes.

4. Whether the court erred in denying petitioners' pre-trial motions to strike from the indictment as prejudicial surplusage allegations that customers were compelled by pressure and coercion to use the services of petitioners' corporation.

STATUTES AND RULES INVOLVED

Statutes:

18 U. S. C.:

SEC. 371. *Conspiracy to commit offense or to defraud United States.*—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall

be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b)).

Federal Rules of Criminal Procedure:

Rule 7. The Indictment and the Information

* * * * *

(d) *Surplusage.* The court on motion of the defendant may strike surplusage from the indictment or information.

* * * * *

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52. Harmless Error and Plain Error

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On November 9, 1954, in the United States District Court for the Eastern District of Missouri, an indictment in two counts was returned against the petitioners, together with one Ralph Caleca and the Twin City Distributing Company, a corporation of which the named individuals were the sole stockholders and officers.

Count one charged a wilful attempt to evade the income taxes of the corporation for its fiscal year ended March 31, 1953, by filing a false corporation tax return in violation of Section 145(b) of the Internal Revenue Code of 1939; and count two charged a conspiracy to evade the corporate taxes by sundry means, in violation of 18 U.S.C., Section 371. (R. 1-6.) A severance was granted as to defendant Caleca, who was not in custody. (R. 11.) After a jury trial, petitioners were found guilty as charged in count two.[1] (R. 174.) On October 29, 1956, each of the petitioners was sentenced to imprisonment for four years and fined $5,000 and costs. (R. 178-179.) The Court of Appeals unanimously affirmed. (Pet. App. 21-37.)

Count two of the indictment alleged in substance that, beginning about January 1, 1952, and continuing through May 27, 1953, petitioners, together with Caleca, conspired to evade the payment of corporate taxes on income received from cigarette vendors for affixing counterfeit City of St. Louis cigarette tax stamp impressions on packages of cigarettes sold at retail through vending machines. The following overt acts were alleged in the indictment: (1) compelling cigarette vendors through the use of fear and economic coercion to employ the corporation's tax stamping services; (2) the use of a counterfeit tax stamp die; (3) the receipt of some $27,000 in cash from vendors and a failure to record such sum in the corporation's books; (4) demands on the vendors to pay partly by check and partly in cash for stamping services; (5) issuing receipts to vendors for payment made by check but failing to issue

[1] The Government dismissed count one at the close of the evidence. (R. 146.)

receipts for cash payments; (6) instructing a customer not to record cash payments to the corporation; (7) withholding cash receipts from the corporate depository; and (8) filing a corporate tax return on May 27, 1953. (R. 2-6.)

The evidence to support the verdict may be summarized as follows:

Petitioners, together with Caleca, were the sole stockholders and officers of the Twin City Distributing Company, a Missouri corporation organized in March 1952 to carry on the business of a partnership of which the three were members. (R. 28-29, 44.) The corporation was engaged in the business of selling cigarettes at retail through vending machines. It also made sales of cigarettes at wholesale and, in addition, received income from other cigarette dealers for affixing a city tax stamp on their cigarettes. (R. 52-54.) The corporation's books were kept and its returns were prepared on the basis of a fiscal year ending March 31. (R. 29, 44-46.)

At all times material, the City of St. Louis levied a two-cent tax on each package of cigarettes sold at retail. The City authorized a number of dealers, including Twin City Distributing Company, to affix the stamp tax impression not only on their own cigarettes but on those of other dealers as well by use of a Pitney-Bowes stamping meter in which the City would set the number of impressions purchased. Dealers authorized to use the stamping meters were given a discount by the City of ten per cent. The discount was reduced in February 1953 to seven percent. (R. 35-41.)

During 1952 and the first three months of 1953, petitioners and Caleca, sometimes singly and at other times together, persuaded six cigarette dealers to have

their tax stamping done by the corporation, part at the legal rate and part at a cut rate. In most instances, the dealers refused petitioners' initial solicitation and agreed to have the corporation do their tax stamping only after the loss of vending machine locations. (R. 55-57, 64, 75-76, 91-92, 97-99, 102-105.) For example, dealer Siegel testified that he was approached on four occasions before agreeing to have his cigarettes stamped by the corporation; and that each refusal was followed by a loss of vending machine locations. (R. 102-103.) There was evidence that four of the dealers lost "stops" to the corporation before agreeing to use its tax stamping service. (R. 56, 64, 76, 102-103.)

Under the arrangement which petitioners made with the dealers, the corporation stamped part of their cigarettes at the legal rate of $10 an average case and part at a reduced rate of $6 an average case. The stamping was done on the corporation's premises. The cut-rate stamping was paid for by the dealers in cash for which sums they were given no receipts. These cash payments were usually made to one of the petitioners or Caleca. The dealers were given receipts for the legal rate stamping which in most instances was paid for by check. According to the testimony of the six dealers, a total of $26,175 was paid to petitioners for cut-rate stamping by the corporation during its fiscal year ended March 31, 1953. (R. 55-108, 134-136.)

The cash sums received by petitioners for the cut-rate stamping were not entered on the corporation's books from which its tax return was prepared and were not deposited in its bank account. Neither the corporation's bookkeeper nor the accountant who prepared the return had any knowledge of the cash payments for cut-

rate stamping. (R. 44-55.) The corporate tax return was signed by petitioner Lopiparo, as president, and Caleca, as treasurer. A tax liability of $2,503 was reported in the return. (R. 29-30.) Internal Revenue Agent Horn testified that, if the $26,175 received for cut rate stamping were added to the corporation's gross income as reported ($187,177), the corporation's tax liability would be $14,177. (R. 140-141.)

The corporation's books showed stamping income from the six dealers who testified totaling $11,874 (R. 133), plus $3,950 received from a seventh dealer (Ex. 42), or a total of $15,824 for the year in question. The recorded legal rate stamping income, $15,824, plus the unrecorded sums received for cut-rate stamping, $26,175, totalled $41,999. (R. 136.) During the same period, the corporation paid a total of only $28,653 to the City of St. Louis for tax stamp impressions, including those purchased for cigarettes sold by it. (R. 30, 40, 48.) A body of evidence was received over petitioners' objection revealing that packages of cigarettes purchased by police officers in September 1953 from vending machines licensed to the corporation, had counterfeit city tax stamp impressions. (R. 109-122.) The court permitted the jury to consider this evidence only as bearing on the question of intent. (R. 157-158.)

Petitioners did not present any evidence. The defense rested at the conclusion of the Government's case and moved for judgment of acquittal on the ground that the evidence was insufficient to sustain a judgment of conviction. (R. 145-146.) The court, having reserved ruling on the motion (R. 146), denied it after verdict (R. 177).

The court's lengthy charge to the jury (R. 146-171), included a reading of the conspiracy statute (R. 149)

and of count two of the indictment (R. 149-153). The court, among other things, reviewed for the jury the contentions of the parties (R. 156-157) and instructed the jury as to the essential elements of the offense of tax evasion as well as that of conspiracy (R. 158-164). Under the charge, the conspiracy alleged was specifically limited to the objective of evading the corporation's income taxes, and the jury was instructed to find petitioners not guilty unless this was proven beyond a reasonable doubt. (R. 158.) The jury was also admonished that it must consider the charge as a whole (R. 148) and that its verdict must be unanimous (R. 170). The instructions to the jury read, in part, as follows (R. 158, 162-164, 170):

> Under Count 2 of the indictment it is necessary for the government to prove that defendants entered into a conspiracy specifically to defeat and evade the federal income tax liability of the Twin City Distributing Company. It is not sufficient if you find that defendants entered into a conspiracy or agreement, and that such conspiracy or agreement contemplated the violation of other federal, state or city laws. If you believe that defendants only conspired to violate any other federal, state or city laws, you must find the defendants not guilty.
>
> * * * * *
>
> It is, therefore, necessary as to Count 2 of the indictment, before you can convict the defendants, or either of them, that you find beyond a reasonable doubt that there was a conspiracy, and that the acts charged to have been committed by the defendants were intentionally committed

by the defendants pursuant to the conspiracy, and that the acts were committed for the purpose and object of advancing the conspiracy charged, and with the knowledge that if the plan of the conspiracy was accomplished, the conspiracy would directly and substantially affect the income tax liability of the Twin City Distributing Company for the fiscal year ending March 31, 1953, by substantially reducing the net income and the amount of income taxes the corporation would owe, and was known to the defendants when they entered into the conspiracy.

* * * * *

The mere failure of the Twin City Distributing Company to include and report income in its return and to pay the tax on it, even if defendants knew that it was due, would not constitute the offense of conspiracy to defeat and evade corporate income tax. You may not find defendants guilty of conspiracy to defeat and evade corporate income tax if you find only that they or either of them willfully filed a false return and failed to pay the amount of the tax due. Even if you should find that defendants or either of them filed a false return, yet before you can find the defendants guilty under the indictment in this case it is necessary that you find and believe beyond a reasonable doubt that in addition to the filing of the return defendants also conspired to commit some affirmative and positive act of fraud in connection with the corporate income tax return of the Twin City Distributing Company.

* * * * *

> When all of you agree to a verdict, then the verdict is the verdict of you as a jury. Your verdict must be unanimous.

Petitioners objected, among other things, to the portions of the charge in which the jury was instructed that the conspiracy offense is complete if any one of the overt acts alleged was committed. This objection was made on the grounds that overt acts Nos. 1, 4, and 6 were not supported by the evidence and that overt act No. 8, if proven, was insufficient as a matter of law. Petitioners did not move the court to withdraw the challenged overt acts from the jury's consideration and did not request the court to instruct the jury to find specially the overt act or acts upon which the verdict rested. (R. 171-172.) At the request of the jury, the charge was given a second time, except for the initial paragraphs relating to the duties of jurors, and petitioners renewed the objections they had previously made. (R. 173-174.)

ARGUMENT

1. Petitioners contend that the instructions to the jury were deficient in the following respects: (a) that the jury was not adequately instructed on the offense of tax evasion, which was the alleged object of the conspiracy (Pet. 10-12); (b) that the jury was not specifically instructed that unanimity is essential as to the particular overt act (or acts) found to be in furtherance of the conspiracy (Pet. 12-13); (c) that the jury was not required to find specially the overt act (or acts) on which their verdict rested (Pet. 13-14); and (d) that the charge was so framed that petitioners could

have been convicted of an offense (*i. e.*, conspiracy to defraud the United States) not charged in the indictment (which charged a conspiracy to evade taxes) (Pet. 15-18).

None of the points now assigned as error was preserved by petitioners in the trial court (R. 171-174) by a request to charge or by objections to the charge as given, as required by Rule 30, Federal Rules of Criminal Procedure (*supra*, p. 4). Since the alleged errors were not properly preserved, petitioners cannot be heard to complain now unless the error assigned is so plain and prejudicial as to require reversal by this Court to prevent a miscarriage of justice or to preserve the integrity of judicial proceedings. See *United States* v. *Atkinson*, 297 U. S. 157; *Herzog* v. *United States*, 235 F. 2d 664 (C. A. 9th), certiorari denied, 352 U. S. 844; *Schumacher* v. *United States*, 216 F. 2d 780 (C. A. 8th), certiorari denied, 348 U. S. 951; *United States* v. *Sansone*, 231 F. 2d 887 (C. A. 2d), certiorari denied, 351 U. S. 987; *Lash* v. *United States*, 221 F. 2d 237 (C. A. 1st), certiorari denied, 350 U. S. 826. Rules 30 and 52, Federal Rules of Criminal Procedure (*supra*, p. 4). Even if there were error here, it is hardly plain error of a character which this Court ought to notice. Furthermore, with the exception of the first point, the matters now complained of were not raised by petitioners in the Court of Appeals, and this Court has repeatedly ruled that only in exceptional cases will it review a question not raised below. *Lawn* v. *United States*, 355 U. S. 339; *Husty* v. *United States*, 282 U. S. 694; *Duignan* v. *United States*, 274 U. S. 195. No exceptional circumstances exist here.

In any event, the court's charge (R. 146-171) was a model of clarity and completeness, and the points raised by petitioners are without merit. (a) The contention that the jury was not adequately instructed on the offense of tax evasion which was the alleged object of the conspiracy boils down to a complaint that the court failed to read to the jury Section 145(b) of the Internal Revenue Code of 1939 (*supra*, p. 3). However, it is apparent from the charge as a whole, as the court below noted (Pet. 33), that the "content of the statute was clearly before the jury."

(b) As to the requirement of unanimity in the jury verdict, the jury was expressly instructed (*supra*, p. 11) that their verdict must be unanimous. Whether the verdict here could have been founded on an insufficient (factually or legally) overt act is not, as petitioners imply (Pet. 12-13), left to speculation. As we shall show (*infra*, p. 14), and as the court below pointed out (Pet. 27-30, 36-37), there is no substance to petitioners' attack on some of the overt acts alleged in the indictment. (c) And, for that reason, there likewise is no substance to petitioners' argument (Pet. 13) that special findings on the overt acts, no provision for which is made in the Federal Rules of Criminal Procedure, were required here.

(d) Finally, petitioners' contention that the instructions were so framed that they could have been convicted of a conspiracy to defraud the United States, rather than a conspiracy to evade taxes as charged in the indictment, ignores the plain language and import of the instructions. The jury was pointedly instructed (*supra*, pp. 9-10) on the necessity for the Government to

prove that petitioners entered into a conspiracy for the specific purpose of evading the corporation's income taxes.

Contrary to petitioners' assertions (Pet. 10-12), the decision below is not in conflict in any way with the decision of the Court of Appeals for the Ninth Circuit in *Morris* v. *United States*, 156 F. 2d 525, or the decision of the Court of Appeals for the Third Circuit in *United States* v. *Levy*, 153 F. 2d 995. Here, unlike the situation in the *Morris* and *Levy* cases which involved prosecutions for violation of the Emergency Price Control Act, the jury was fully instructed on the offense charged in the indictment.

2. Petitioners contend (Pet. 13-15) that, while the jury was allowed to convict if they found the commission of any one of the overt acts alleged, overt act No. 8 is legally insufficient, since it alleged only the filing of a corporate return and not a false return, and overt act No. 1, alleging the use of fear and compulsion, is not supported by the evidence. As to overt act No. 8, it suffices to note that petitioners ignore the allegation of means in the indictment, namely, that it was part of the conspiracy that petitioners would prepare and cause to be filed "a false and fraudulent tax return for * * * the said corporation" (R. 3). The allegation of the overt act—that the return was filed—makes plain that the means alleged were employed. With respect to overt act No. 1, there is ample evidence (*supra*, p. 7), as the court below pointed out (Pet. 27-28), to support the allegation that petitioners used fear and coercion—at least to the extent of economic pressure—in obtaining customers for the corporation's cut-rate tax stamping service.

3. Petitioners contend (Pet. 18) that, under the doctrines of double jeopardy and *res judicata*, the Government's dismissal at the trial of the count charging the substantive offense of tax evasion barred their conviction in the same proceeding on the count charging conspiracy to commit the substantive offense because "the evidence adduced to sustain the charge under each count was the same, and the two offenses were in fact identical." This issue also was not raised in the Court of Appeals. (See discussion, *supra*, p. 12.) Not only are there no exceptional circumstances present here which would require review by this Court in the absence of an assignment of error below, but also the argument is without merit.

In *United States* v. *Klein*, 247 F. 2d 908, certiorari denied, 355 U.S. 924, the Court of Appeals for the Second Circuit only recently rejected a similar argument, observing (p. 919) that "it is clear that there is no double jeopardy from differing dispositions of counts of a single indictment at a single trial." See *Dunn* v. *United States*, 284 U.S. 390; *Dealy* v. *United States*, 152 U.S. 539; *Barsock* v. *United States*, 177 F. 2d 141 (C.A. 9th); *Corbin* v. *United States*, 205 Fed. 278 (C.A. 8th). Moreover, contrary to petitioners' assertion (Pet. 18), the offenses charged are not identical. Here, as in *Pereira* v. *United States*, 347 U.S. 1, the substantive offense charged (tax evasion) does not require more than one person for its commission; whereas conspiracy requires proof of an agreement to commit an offense against the United States, proof not necessary to conviction on the substantive offense. With respect to *res judicata*, it suffices to note, as this Court pointed out in *Sealfon* v.

United States, 332 U.S. 575, 578, that the doctrine operates to conclude only those matters in issue which the verdict determined. Here there was no verdict as to the first count of the indictment.

4. Finally, petitioners contend (Pet. 19-20) that the court erred in denying their pre-trial motions under Rule 7(d), Federal Rules of Criminal Procedure (*supra*, p. 3), to strike from the indictment, as prejudicial surplusage, allegations that they compelled customers by "pressure", "coercion" and "fear" to use the corporation's tax stamping service. To the grounds alleged in the trial court, petitioners now add (Pet. 19-20) that the allegations are unsupported by the evidence. This contention is also without merit.

It can hardly be said from a fair reading of the indictment (R. 1-6) that the allegations complained of were mere surplusage unrelated to the offenses charged. See *United States* v. *Klein*, 124 F. Supp. 476 (S.D. N.Y.). The point need not be labored that, if petitioners were to profit from their fraudulent schemes, it was necessary for them to obtain customers for the corporation's cut-rate tax stamping service; and it is a fair inference from the evidence (*supra*, pp. 6-7) that they set out to secure those customers by fair means or foul. To assert, as do petitioners, that the allegations are without support in the evidence is to ignore the facts of record. There was, as the court below noted (Pet. 27-28), credible evidence to support "[t]he charge of compulsion by the medium of fear, at least of economic loss".

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari raises no question calling for review by this Court and should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 909.

ANTHONY GIARDANO and ANTHONY LOPIPARO,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

Of Order Denying Petition for Writ of Certiorari.

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UNITED STATES OF AMERICA.

PETITION FOR REHEARING

Of Order Denying Petition for Writ of Certiorari.

Petitioner prays that this Court grant rehearing of its order of June 2, 1958, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above-entitled case as prayed for in the petition filed herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

The court, in denying certiorari, has overlooked a fundamental question of criminal law, which this court has not but should pass upon in its supervisory capacity of criminal justice.

This court has never passed upon the rights and duties of District Courts to strike irrelevant and prejudicial matters from an indictment on motion of the defense. Rule 7 (d) of the Federal Rules of Criminal Procedure authorizes such action.[1] Heretofore, this court has held that striking anything from an indictment nullifies it on the theory that after the change it is no longer the indictment of the grand jury that presented it. **Ex Parte Bain,**

1 United States v. Hood, 5 Cir., 200 F. (2d) 639, 642; United States v. New York Great A. & P. Tea Co., 5 Cir., 137 F. (2d) 459, 462.

120 U. S. 1. This court in reaching this conclusion relied upon several cases which held that an indictment could not be changed even by consent of the defendant. No case of this court has determined that changing an indictment at the request of the defense to avoid prejudicial and irrelevant matter, if pursuant to Rule 7 (d), would not nullify the indictment. As a result, the District Courts are reluctant to strike prejudicial matter from an indictment and the rule is rarely applied.

In the instant case, the indictment which charged a conspiracy to violate the income tax law contained allegations that defendants "compelled by the use of the medium of fear" various cigarette vendors to have cigarettes sold by said vendors stamped. It presents a clear case where the indictment, loaded with prejudicial matter not necessary to the charge, ought to have been amended on motion of the defense. How could the defendants receive the fair trial guaranteed by the Fifth Amendment to the United States Constitution when such an indictment is read to the jury and such matters as contained therein placed before them at great length? Even the worst offender is entitled to a trial according to the standards which American justice seeks to accord to them.

The procedure was fundamentally unfair. One may be blackened worse in the eyes of the jury by an indictment containing prejudicial matters than by newspaper comment which fatally infects that fundamental fairness essential to the very concept of justice.[2] Newspapers may or may not be read by jurors. The prejudicial matter in the instant case was not disregarded at the trial but was read to the jury during the opening statement of the prosecutor (R. 11-12) and during the court's charge (R. 150). It contained allegations that the defendants used pressure and threats in their methods of soliciting customers even

2 Stroble v. California, 343 U. S. 181, 191-192; Lisenba v. California, 314 U. S. 219, 236.

though no evidence supported these allegations. This court should grant a rehearing and outlaw the use of this type of procedure.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and the reasons urged were not heretofore sufficiently presented.

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